Filed 9/7/12 Marriage of Broderick Ca4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of TERRI A. AND PAUL T. BRODERICK.	
TERRI A. BRODERICK, Respondent, v. PAUL T. BRODERICK, Appellant.	E053413 (Super.Ct.No. RID175492) OPINION

APPEAL from the Superior Court of Riverside County. Irma Poole Asberry, Judge. Appeal dismissed. Petition for writ of mandate denied.

Law Offices of Pittullo, Barker & Associates, and P. Timothy Pittullo for Appellant.

Steven A. Becker for Respondent.

I. INTRODUCTION

Paul Broderick appeals from an order of the trial court that the parties' prior stipulated judgment required a calculation of additional child support upon his Medicare wages rather than his gross earnings exclusive of deferred compensation. We conclude the order appealed from is merely interlocutory and we therefore lack jurisdiction. We will therefore dismiss the appeal, but we will exercise our discretion to treat the appeal as a petition for writ of mandate. Finding no error in the trial court's order, we will deny the petition. In addition, Terri Broderick[1] has requested attorney fees as a sanction for a frivolous appeal. The request is denied.

II. FACTS AND PROCEDURAL BACKGROUND

In May 2002, the court entered judgment of dissolution of the parties' marriage and ordered child support and spousal support pursuant to a stipulation for judgment. The stipulation for judgment provided for joint custody of the couple's three children, born in 1986, 1988, and 1989, with physical custody to Terri and reasonable visitation for Paul. Paul was to pay spousal support of $556 per month and child support of $2,598 per month. The judgment included an *Ostler & Smith*[2] order, under which Paul would pay additional child support of "31% of all gross earnings above $7,500.00 per month gross earnings . . . ." He was to "provide proof of earnings to [Terri] by way of copies of his last pay stub of each calendar quarter within ten days of receipt of that pay stub."

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[1] For clarity and convenience, we hereafter refer to the parties by their first names. In doing so, we intend no disrespect.

[2] *In re Marriage of Ostler & Smith* (1990) 223 Cal.App.3d 33.

On April 15, 2008, Paul filed an order to show cause (OSC) for modification of spousal support. Paul requested termination of spousal support on the grounds that he had paid nearly 12 years of support following a 15-year marriage, and he was currently unemployed.

On June 18, 2008, Terri filed an OSC requesting, among other relief, a "determination of arrears in support and the providing of proof of earnings by way of pay stubs from each quarter since 9/01." (Capitalization omitted.) In her declaration accompanying the OSC, she stated that Paul had never provided proof of his income as required by the judgment.

Following trial, the court ruled, as relevant to this appeal, that Paul's "gross income for determination of amounts is reflected in box 5, Medicare earnings on his W-2s. This amount represents the total, entire, annual compensation of [Paul]. It includes the amounts of deferred compensation and other fringe benefits. Family Code Section 4058 requires that all of the income of the party is to be considered in determining support." (Underlining in original.)

III. DISCUSSION

A. Appealability of Order

Terri asserts that the order on which this appeal was taken was not an appealable order.

The right to appeal is wholly statutory; thus, to be appealable an order must come within one of the classes enumerated in Code of Civil Procedure section 904.1 or another specific statute. This court lacks jurisdiction in the absence of an appealable order.

(*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 21.) On our own motion, we must dismiss an appeal from a nonappealable order. (*In re Marriage of Corona* (2009) 172 Cal.App.4th 1205, 1216 (*Corona*).

As a general rule, a judgment that leaves some judicial act yet to be done "is interlocutory only, and not appealable unless it comes within the statutory classes of appealable interlocutory judgments." (9 Witkin, Cal. Proc. (5th ed. 2008) Appeal, § 136, p. 209.) In *Corona*, for example, the court held that a postjudgment order confirming an arbitrator's award in a marital dissolution proceeding was a nonappealable interlocutory order because the order also appointed a referee to select an accountant to perform an accounting, and the order contemplated further judicial proceedings to adopt the referee's findings after the accounting. (*Corona, supra,* 172 Cal.App.4th at p. 1218.) The court explained: "'In "determining whether a particular decree is essentially interlocutory and nonappealable, or whether it is final and appealable . . . [i]t is not the form of the decree but the substance and effect of the adjudication which is determinative. As a general test, which must be adapted to the particular circumstances of the individual case, it may be said that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory."' [Citations.] A judgment [or order] is final '"'when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.'"'" [Citations.] '"[W]here anything further in the nature of judicial

action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory"' and not appealable. [Citation.]" (*Id.* at pp. 1216-1217.)

In *In re Marriage of Ellis* (2002) 101 Cal.App.4th 400 (*Ellis*), the family court issued a postjudgment order determining that it had authority to evaluate and divide health insurance subsidy benefits as community property, but the order was "only preliminary to *actually* doing so." (*Id.* at p. 403.) The appellate court therefore held that the appeal was brought from a nonappealable order. (*Id.* at pp. 403-404.)

The trial court's order in this case stated, "On 8-21-09, Cathy S. Fix was appointed pursuant to the parties' stipulation to prepare an Evidence Code Section 730 report. Ms. Fix issued a letter that was filed on 2-5-10, setting forth several factors that she needed the court to rule on so that she is able to make a final report." Those orders included the definition of Paul's gross income, as set forth above, and the trial court's ruling concluded, "Counsel are directed to provide a copy of this ruling to Cathy S. Fix so that she may complete her report."

Here, as in *Ellis* and *Corona*, the order appealed from was merely preliminary to further proceedings, and as such, was nonappealable. We will therefore dismiss the appeal.

B. Petition for Extraordinary Writ

While arguing that the order was nonappealable, Terri has nonetheless requested this court to exercise its discretion to construe the appeal as a petition for an extraordinary writ. (See, e.g., *Ellis*, *supra*, 101 Cal.App.4th at pp. 404-405.) Paul has

joined in that request. In *Ellis*, the court construed the appeal as a writ petition when the merits had been fully briefed, both parties requested the court to do so, and resolution of the legal issue could potentially avoid an expensive trial below. (*Id*. at p. 404.) Here, as in *Ellis*, the issue has been fully briefed, and the order being challenged is completely dispositive of a disputed legal issue. We will therefore exercise our discretion to treat the appeal as a petition for writ of mandate.

C. Standard of Review

This case turns on the interpretation of the stipulation for judgment. We interpret a contract de novo when "(a) the trial court's contractual interpretation is based solely upon the terms of the written instrument *without* the aid of extrinsic evidence; (b) there is *no conflict* in the properly admitted extrinsic evidence; or (c) a trial court's determination was made on the basis of *improperly admitted* incompetent evidence. [Citation.]" (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 913.)

D. Analysis

Paul argues that the trial court erred in interpreting the stipulated judgment as requiring that the additional child support percentage under the *Ostler & Smith* order was to be based on his Medicare wages as opposed to his gross earnings exclusive of deferred compensation.

As a general rule, "'[i]ncome is broadly defined for purposes of child support. [Citations.] Subject to certain statutory exceptions . . . [annual] gross income "means income from whatever source derived . . . ." (Fam. Code, § 4058, subd. (a).)'" (*M.S. v. O.S.* (2009) 176 Cal.App.4th 548, 553.) Our Legislature has identified policies that

govern the statutory guidelines for child support awards. As the court stated in *Asfaw v. Woldberhan* (2007) 147 Cal.App.4th 1407 (*Asfaw*), "'California has a strong public policy in favor of adequate child support.' [Citation.] More specifically:

"'The guideline seeks to place the interests of children as the state's top priority.' ([Fam. Code,] § 4053, subd. (e).)

"'A parent's first and principal obligation is to support his or her minor children according to the parent's circumstances and station in life.' ([Fam. Code,] § 4053, subd. (a).)

"'Each parent should pay for the support of the children according to his or her ability.' ([Fam. Code,] § 4053, subd. (d).)

"'Children should share in the standard of living of both parents. Child support may therefore appropriately improve the standard of living of the custodial household to improve the lives of the children.' ([Fam. Code,] § 4053, subd. (f).)" (*Asfaw, supra*, 147 Cal.App.4th at p. 1416.)

In *In re Marriage of Berger* (2009) 170 Cal.App.4th 1070, 1081 (*Berger*), Marc, the former husband, left his lucrative employment at an accounting firm and began working as president and chief executive officer of a landscape business in which he owned an equity interest. (*Id.* at p. 1075.) After the landscape business experienced financial difficulties, Marc agreed to defer his salary, and he then filed an OSC for modification of his child support obligation. (*Ibid.*) The trial court found Marc derived no current income from the landscape business other than $2,000 per month to pay for the family's insurance, but he had accrued approximately $350,000 in deferred income.

Based on those findings, the trial court drastically reduced Marc's child support obligation. (*Id.* at p. 1078.) On appeal, the court held that the trial court had "abused its discretion in deciding those circumstances warranted an order that essentially granted Marc a 'holiday' from any significant responsibility to support his family at the present time." The court explained: "By agreeing to defer his salary to preserve his company's capital, Marc is, in effect, investing in the company. He's agreeing to take no income now, with the expectation that if the company's fortunes later improve, he will be compensated with additional equity. And he is funding that choice by relying upon his other assets to support his living expenses. But Marc could have just as easily chosen to retain his salary—which after all, he needs to support himself—*and his family*—and instead utilize his *other assets* to fund monthly capital investments into his company." (*Id.* at p. 1082.) The court concluded, "Marc cannot unilaterally, and voluntarily, arrange his business affairs in such a way as to effectively preclude his children from sharing in the benefits of his *current* standard of living." (*Ibid.*)

In *Asfaw*, the trial court allowed depreciation of the father's rental properties to reduce the father's business income and correspondingly, his child support obligation. The appellate court reversed, explaining that although the child support statutes define income broadly, "deduction provisions are specific and narrowly construed." (*Asfaw, supra*, 147 Cal.App.4th at p. 1425.) Moreover, the overriding policies of the child support statutes were "at odds with a child's receiving less financial support from a parent who is permitted under tax laws and accounting principles to take a deduction that does not reduce funds available for support." (*Id.* at p. 1426, fn. omitted.)

Paul argues that the parties intended the term "gross earnings" as used in the stipulation for judgment to mean his gross earnings as reflected in box 1 of his W-2 forms, exclusive of deferred compensation. We must interpret the term "gross earnings" consistently with the statutory scheme governing child support in this state. Paul's interpretation of the stipulation for judgment would allow him to unilaterally elect to defer some of his compensation from employment and thereby exclude it from his gross earnings for purposes of child support. That result would be inconsistent with *Berger* and *Asfaw* and would allow Paul to subvert Legislative policies underlying child support awards. Although neither *Berger* nor *Asfaw* involved the interpretation of a stipulation for judgment, the principles expressed in those cases are nonetheless persuasive, and in light of those principles, Paul's interpretation of the contract is unreasonable. We conclude that Paul cannot reduce his child support obligation by voluntarily deferring his compensation.

E. Request for Attorney Fees

Terri has requested an award of attorney fees and/or another sanction on the ground that Paul's appeal was frivolous. A party may be sanctioned on appeal if the appeal is prosecuted for an improper motive or is totally without merit. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) However, Terri's request was made in her brief, not by a motion with a supporting declaration as required by California Rules of Court, rule 8.276(b)(1). We therefore do not consider it further. (See *FEI Enterprises, Inc. v. Yoon* (2011) 194 Cal.App.4th 790, 807.)

IV. DISPOSITION

We dismiss the appeal but exercise our discretion to treat the appeal as a petition for writ of mandate. The petition is denied. Respondent shall recover her costs on appeal.

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HOLLENHORST
J.

We concur:

RAMIREZ
P.J.

KING
J.